

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-1375

To be argued by
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

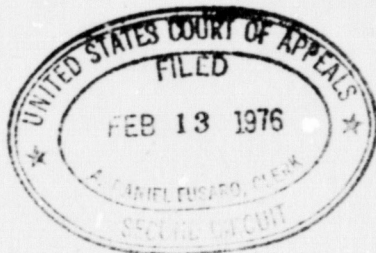
JOHNNIE A. NORMAN,

Appellant.

Docket No. 75-1375

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JOHNNIE A. NORMAN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

RICHARD A. GREENBERG,
Of Counsel.

PAGINATION AS IN ORIGINAL COPY

CO. 1000 DOCKET

75 of 491

BRAND

TITLE OF CASE

ATTORNEYS:

THE UNITED STATES

For U. S.: Anion

JOHNIE A. NORMAN and
John Doe aka "Hank".

True name: HENRY CAIN, JR.

(attended 3-28-75)

~~Court apptd counsel:~~
For Defendant:

Robert Schmickler

121 Schermerhorn St

Brooklyn, NY.

834-1144

Did forge name of payee/payable to another on U.S. Treasury Check

DATE _____

PROCEEDINGS

2-4-75	Before Mishler, Ch J - Indictment filed
1/13/75	Before BRAMWELL, J.- Case called- Deft not present- Counsel present- Pl. adjd to 2/20/75 at 2:00 P.M.
13/75	Notice of readiness for trial filed
2-20-75	Letter filed dated 2-13-75 received from Chambers.
2-20-75	Before BRAMWELL J - case called - deft Norman & counsel J.Seybert of Legal Aid present -deft waives reading of the indictment and enters a plea of not guilty - case adjd to 3-31-75., for trial - bail set at \$5,000 P.R.B. - Bench Warrant ordered for deft JOHN DOE.
2/2/75	Bench Warrant issued.
2/24/75	Magistrate's file 75 M 289 inserted into CR file.
3-28-75	Before DOOLING -

75 CR 95

PROCEEDINGS

counsel present - deft arraigned and enters a plea of not guilty - d
to be released upon his execution of a P.R. Bond of \$1,000 -deft to
appear 3-31-75 at 10:00 am to set a date for trial.

3-28-75 Bench Warrant ret'd and filed - Executed.

3-28-75 Financial affidavit filed - placed in criminal folder.

3-28-75 By BRAMWELL, J - Order filed appointing counsel.

3/31/75 Before BRAMWELL, J.- Case called- Deft NORMAN not present-Counsel Leg
Aid present-Deft CAIN present with counsel - case adj'd to 6/16/75 at
A.M. for trial- bench warrant ordered for deft NORMAN

4/1/75 Bench warrant issued (NORMAN)

6/20/75 Bench warrant ret'd and filed- executed(NORMAN)

6/20/75 Before Bramwell J - Case called - Dfe. brought into Court on Bench
Warrant - Deft. ~~& NORMAN~~ JOHNNIE NORMAN & counsel Joanna Seybert
present. Deft. arraigned and enters a plea of not guilty. - Deft. O.F
and case set down for trial for July 23, 1975 at 10:00 A.M.

7/11/75 75 M 515 is inserted in CR file.

7-23-75 Before BRAMWELL, J - case called - deft NORMAN & counsel Joanna
Seybert of Legal Aid present - superseding Information is withdrawn
Original indictment 75 CR 75 is set for trial on July 28, 1975.

7-25-75 Stenographers transcript filed dated July 23, 1975 (NORMAN)

7-28-75 Stenographers transcript filed dated June 16, 1975.

7/28/75 Before BRAMWELL, J.- Case called- Adj'd to 7/30/75 for trial
CAIN JR.

7-30-75 Before BRAMWELL, J - case called - deft/ & counsel J. Seybert of
Legal Aid present - case adj'd to Sept. 8, 1975 for trial @ 10:00 am.

8-13-75 Before BRAMWELL, J - case called - deft & counsel Robert Schmukler
present - ~~deft~~ On motion of Asst. U.S. Atty. Marks the Indictment
is dismissed. Motion granted. (CAIN JR)

8-13-75 By BRAMWELL, J - Order of dismissal filed. (CAIN JR)

9-2-75 Before BRAMWELL, J - case called - deft NORMAN & atty Joanna Seybert
of Legal Aid present - trial ordered and begun - jurors selected and
sworn - Govt rests - deft moves for Judgment of acquittal etc.
motion denied with leave to renew - trial cont'd to 9-3-75.

9-3-75 Before BRAMWELL, J - case called - deft & counsel Joanna Seybert of
Legal Aid present - trial resumed - defts motion to suppress is deni
Govts motion to reopen its case - motion granted - Govt rests - tri
cont'd to 9-4-75 at 2:00 PM.

9-4-75 Before BRAMWELL, J - case called - deft & counsel present - trial

CRIMINAL DOCKET

DATE

PROCEEDINGS

Jury came into court at 6:30 PM and Jury was sent home to return on 9-5-75 at 9:30 am.

9/5/75 Before BRAMWELL, J. - Case called- Deft and counsel present-Trial resumes deliberations-Jury returns and renders a verdict of guilty Jury polled-jury discharged-trial concluded-all motions by 9/19/75 contd and sentence adjd without date

9/5/75 By BRAMWELL, J. - Order of sustenance filed

9-19-75 Before BRAMWELL, J - case called - deft & atty Joanna Seybert present - oral motion of deft to set aside verdict and to renew all motions made during trial etc. - motion argued -motion denied (NORMAN)

10-17-75 Before BRAMWELL, J - case called - deft NORMAN not present - counsel J Seybert of Legal Aid present - sentence adjd to 10-24-75 at 10:00 am on consent.

10-24-75 Before BRAMWELL, J - case called - deft Norman & atty J.Seybert present - deft sentenced to imprisonment for 2 years - execution of sentence is suspended and the deft is placed on probation for 3 years. Special condition of probation:"that the deft seek and receive treatment for alcoholism under the direction of the Probation Dept." Deft advised of his right to appeal.

10-24-75 Judgment & Order of probation filed - certified copies to Probation (NORMAN)

10-24-75 Notice of Appeal filed. (no fee)

10-24-75 Docket entries and duplicate of Notice mailed to the C of A and Form A. (NORMAN)

10-24-75 By BRAMWELL, J - Order filed that Dr. M. Joseph , a witness subpoenaed by the deft to appear in the above action on 9-4-75 pursuant to Rule 17(b) FRCP and having appeared on that date, be paid fees of a witness by the U.S.Marshal for the Eastern District of N.Y.

10-31-75 Voucher for compensation of counsel filed. (Norman)

11/5/75 Order received from Court of appeals that record be filed on or 12/10/75

12/10/75 Record on appeal certified and handed to Joan Gilly for delivery appeals

APPEAL CO.
DATED 12/10
BY <i>[Signature]</i>
DEPT. CLERK

TRP:CBA:ip
F.#751,134

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

FEB 4 1975

UNITED STATES OF AMERICA

-against-

JOHNNIE A. NORMAN and
JOHN DOE, a/k/a "Hank",

*the name
HENRY CAIN Jr.*

Defendants.

TIME A.M. No.:
P.M. Cr.:
(T.18, U.S.C., §495 and §2)

THE GRAND JURY CHARGES:

On or about the 5th day of March 1973, within the Eastern District of New York, the defendants JOHNNIE A. NORMAN and JOHN DOE, also known as "Hank", with intent to defraud the United States, did utter and publish as true United States Treasury Check No. 75,083,381 dated March 1, 1973, in the sum of Five Hundred and Twenty-six Dollars (\$526.00), payable to John Mansfield, upon which the name of the payee had been forged, knowing the payee's name to be forged. (Title 18, United States Code, Sections 495 and 2.)

A TRUE BILL.

Priscilla Willis
Foreman.

David H. [Signature]
UNITED STATES ATTORNEY

15 THE COURT: Thank you, Ms. Schwartz.

16 I'm about to charge the jury. If anyone wishes
17 to leave the courtroom they may do so now.
18 They may not leave during the charge.
19

20 Mr. Foreman, ladies and gentlemen of the
21 jury: We come now to the final stage of the
22 proceeding. The court will now charge you on
23 the law to be applied to the facts in the case.
24 As you may recall, I initially gave you a pre-
25 charge. As to the manner in which, the case would

1 be presented to you. I told you that most of
2 the evidence in the case would come in the form
3 of the testimony of the witnesses on that you
4 were to pay special attention to the manner in
5 which the witnesses testified. I believe I
6 also instructed you that you would be the judges
7 of the facts in the case.

8 That being your sole province and that
9 your recollection of the facts after having heard
10 all the evidence in the case, the testimony of
11 the witnesses, the documentary proof, was to
12 control the determination of the issues. Likewise
13 at that time I told you that I would be the
14 judge of the law. This has not changed at this
15 stage of the proceeding. I will not review the
16 facts of the case for you as you have just
17 heard the summations by the attorneys and there
18 is no need for a review of the facts.

19 In any event, if you find that there is
20 some fact in the case that you may have forgotten
21 or don't recollect or you can't agree with
22 each other in your deliberations, you can
23 have it read back from the record and that will,
24 I'm sure, refresh your memory. In any event,
25 I am the judge of the law and you must accept

1 what I say to be the law in this case. The
2 court has admitted according to the rules,
3 the attorneys to make opening statements and
4 summations to you. Under no circumstances are
5 the statements they have made by way of opening
6 or by way of summation to be taken as evidence.
7 However, the court and the law does permit you
8 to take the argument that they have professed
9 before you and wave those arguments. If you
10 agree with what they have said either side of
11 the case, you may use those arguments in your
12 deliberations and in discussing the case with
13 each other. And try to convince one another as
14 to what the final determination shall be with
15 reference to the deliberations at hand.
16 If you feel that the arguments are not commensurate
17 with the testimony and the proof and the case
18 you may disregard them. The arguments are not
19 evidence and you need not wave them. However,
20 there are times when the arguments of the attorneys
21 will give you an insight as to something you may
22 have missed and you may discuss that portion of
23 it, if you so desire.

24 Now, of course, I also said to you that during
25 the trial the court will be the judge of the law.

1 Likewise, as to motions which at times we had
2 at the side bars, as you may recall, that was
3 not for the purpose of keeping any of the proof
4 from you, but were matters of law that were
5 discussed between the attorneys and the court.
6 It should not have come before you

7 In any event, if you feel that you have
8 discovered by some breach of your imagination
9 what this court thinks as to either some of the
10 testimony or the case itself, you should remove
11 that from your mind because I tell you here and
12 now, I have come to no conclusion in this
13 case, nor have I indicated to you in any way
14 whatsoever what my feelings are with reference
15 to the facts in the case or with reference to the
16 guilt of the defendant. That is your province
17 and your job. You should not try to weigh
18 what you believe the court's impressions may be.

19 Understand that the lawyers who appear before
20 you are advocates of law. They are advocating
21 the best case they can for the parties they
22 represent and they have a right to exercise as
23 much forcefulness as they desire in their
24 questioning or otherwise, in presenting their
25 case. I say this because this is within the

1 framework of the ordinary trial. In determining
2 the facts, the jury is reminded that before each
3 member was accepted and sworn to act as a juror,
4 it was he or she, was asked questions regarding
5 his or her competency, qualifications, fairness
6 and freedom from prejudice or sympathy. On the
7 face of those answers, the jury was accepted
8 by the parties. Therefore, those answers are
9 as binding on each of the jurors now as they
10 were then and should remain so until the jury is
11 discharged from consideration of this case.
12 You cannot decide that you do not like the
13 sections of law that I will quote to you or any
14 other part of the charge. You have the obligation
15 of accepting the law as I charge you. Just as
16 I have the obligation of accepting your findings
17 of the facts in your ultimate verdict as to the
18 guilt or innocence of the defendant.

19 As to the charge before the court, it lends
20 for predictability and stability if judges
21 throughout the country in types of charges such
22 as this, charge you uniformly or substantially
23 so. And the jurors accepted. It would be unfair
24 for you to decide this case on your own notions
25 of what the law should be. Another jury decide

on their own notions of what the law should be;
this is considered the obligation as a firm one.
One that you should understand. Of course, you
know by this time that this case has come before
you by way of an indictment presented by a
grand jury, sitting in this eastern district.
That indictment charges the defendant with the
counts I shall now read to you; remember the
indictment is merely an accusation. Merely
a piece of paper. It is not evidence and it is
not proof of anything. The indictment reads
as follows: "On or about the fifth day of March,
1973, within the Eastern District of New York,
the defendants Johnnie A. Norman and John Doe,
also known as Hank, with intent to defraud
the United States, did utter and publish as true,
the United States Treasury check #75083381, dated
March 1, 1973. In the sum of \$526.00, payable
to John Mansfield. Upon which, the name of the
payee, had been forged. Knowing the payee's
name to be forged, in violation of title 18,
sections 495 and 2."

This code provides in part as follows:

"Whoever falsely names, alters or gives or
counterfeits any writing for the purpose of

1 obtaining or receiving or of enabling any other
2 person, either directly or indirectly to obtain
3 or receive from the United States, any offices
4 or agents thereof, any sum of money or whoever
5 utters or publishes as true, any such false,
6 forged or altered or counterfeited writing with
7 the intent to defraud the United States is
8 knowing the same to be false, altered, forged
9 or counterfeited, shall be guilty of an offense
10 against the laws of the United States".

11 Those are the essential elements of the
12 offense charged in the indictment. Each of which,
13 the government must prove beyond a reasonable
14 doubt that on or about March 5, 1973 in the
15 Eastern District of New York, the defendant
16 Johnnie Norman uttered and published as true
17 United States Treasury check #75083381, dated
18 March 1, 1973. Payable to John Mansfield in the
19 amount of \$526.00; second, that the defendant
20 did such act with knowledge that the payee,
21 Johnnie Mansfield endorsement on the back of
22 said check was a forgery; third, that the endorse-
23 ment of the payee John Mansfield was forged; and
24 four, that the defendant did such act willfully
25 and with the intent to defraud the United States.

1 And as stated before, the burden is always upon
2 the government to prove beyond a reasonable
3 doubt every essential element of the crime
4 charged. The law never imposes upon a defendant
5 in a criminal case the burden of duty of calling
6 any witnesses or producing any evidence. Please
7 bear in mind any following definitions in
8 consideration, the essential element of the crime
9 charged. Writing, what included the term
10 writing is used in the statute just read,
11 included a check drawn on the Treasury of the
12 United States. Forgery, define the writing of
13 a piece of paper, is an endorsement on a genuine
14 United States Treasury check by a person other
15 than the payee. If done willfully and without
16 another and with intent to defraud, is a forgery
17 within the statute. Utter, define, the phrase
18 utter or publish as true as used in the statute,
19 means to make or attempt any use of a written
20 or printed instrument or document. Such as an
21 attempt to place a check in circulation. Whereby
22 or in connection with, which some assertion
23 representation or claim is made to another in
24 some way or manner, directly or indirectly
25 expressly or implied or by word or conduct that

1 the check or document is genuine.

2 Intent to defraud define, the evidence
3 in the case need not establish that the United
4 States or anyone else was actually defrauded,
5 but only that the accused acted with the intent
6 to defraud. To act with intent to defraud means
7 to act with a specific intent to deceive or check
8 or lie for the purpose of either cashing
9 some financial loss to another or bringing about
10 some financial gain to one's self. Willfully
11 to act, an act is done willfully if done
12 voluntarily and intentionally and with the specific
13 intent to do something the law forbids; that is,
14 do say with bad purpose either to disobey or
15 to disregard the law. Definition of a specific
16 intent; the crime charge in this case is a serious
17 crime which requires proof of specific intent.
18 Before a defendant can be convicted a specific
19 intent as the term implies, means more than the
20 general intent to commit the act. To establish
21 specific intent, the government must prove that
22 a defendant knowingly did an act that the law
23 forbids.

24 Purposely intending to violate the law. Such
25 intent may be determined from all the facts and

1 circumstances surrounding the case. Intent
2 ordinarily may not be proved directly. Because
3 there is no way of scrutinizing the operations
4 of the human mind. But you may infer the
5 defendant's intent and the surrounding
6 circumstances. You may consider any statement
7 made, an act done or omitted by a defendant.
8 And all of the facts and circumstances in
9 evidence which, indicate his state of mind.

10 It is ordinarily reasonable to infer that
11 a person intends the natural and probable
12 consequences of acts knowingly done or knowingly
13 omitted. Knowingly, an attack, an act, an act
14 is done knowingly, if done voluntarily and
15 intentionally, not because of mistake or accident
16 or other innocent reason. Although intoxication
17 or drunkenness alone will never provide a legal
18 excuse for the commission of a crime, the fact
19 that a person may have been intoxicated at the
20 time of the commission of the crime, may negate
21 the existence of a specific intent. So evidence
22 that a defendant acted or failed to act while
23 in a state of intoxication is to be considered
24 in determining whether or not the defendant
25 acted or failed to act with specific intent as

1 charged.

2 The jury may find that the defendant was
3 or was not intoxicated on the evidence that has
4 been submitted. If the evidence leaves the
5 jury with a reasonable doubt whether because of
6 the degrees of his intoxication, the mind of the
7 accused was capable of forming or did form specific
8 intent to commit the crime charged, a jury should
9 acquit the accused. Proof of guilt, knowledge
10 of the falsity of the representations made is
11 seldom susceptible of proof by direct testimony.
12 It is impossible to look into a person's mind
13 to ascertain what his knowledge or intent was.
14 Consequently, the proof of this element of
15 knowledge may arrest as it frequently must,
16 on evidence of facts and circumstances from which
17 any jury may draw the only reasonable and logical
18 inference to be drawn therefrom.

19 In reaching its conclusion upon this issue
20 the jury has a right to consider all of the
21 circumstances surrounding the particular defendant's
22 situation. And his declarations, conduct and
23 information received by him.

24 Aiding and abetting is dealt with in section
25 2 of title 18 of the United States code. Which

1 reads as follows: "Whoever commits an offense
2 against the United States or aids and abets
3 consoles, commands, induces or procures its
4 commission, is punishable as a principal. Whoever
5 willfully, causes an act to be done which if
6 directly performed by him or another would be
7 an offense against the United States, is
8 punishable as a principal."

9 Thus, the guilt of a defendant may be
10 established without proof that the accused
11 personally did every act constituting the offense
12 charged. In other words, every person who
13 willfully participates in the commission of a
14 crime may be found to be guilty of that offense,
15 participation is willful if done voluntarily
16 and intentionally and with the specific intent
17 to do something the law forbids. Or with the
18 specific intent to fail to do something which
19 the law requires to be done. That is to say,
20 with bad purpose, either to disobey or to
21 disregard the law. Aiding and abetting define,
22 in order to aid and abet another to commit a
23 crime, it is necessary that the accused willfully
24 associate himself in some way with the criminal
25 venture and willfully participate in it. As he

1 would, in something he wishes to bring about.
2 That is to say, that he willfully seeked by some
3 act or omission of his, to make the criminal
4 venture succeed. An act or omission willfully
5 done if done voluntarily, and intentionally,
6 and with the specific intent to do something
7 the law forbids or with the specific intent to
8 fail to do something the law requires to be done.
9 That is to say, with bad purpose either to
10 disobey or to disregard the law.

11 Of course, you may not find the defendant
12 guilty unless you find beyond a reasonable doubt
13 that each and every element of the offense
14 as defined in these instructions was committed
15 by some person or persons. That the defendant
16 participated in its commission. Mere presence,
17 is not sufficient. Mere presence at the scene
18 of the crime and knowledge that a crime is
19 being committed are not sufficient to establish
20 the defendant aided and abetted the crime unless
21 you find beyond a reasonable doubt. That the
22 defendant, was a participant not merely a knowing
23 spectator. Reasonable doubt; now there are in
24 many ways, two types of evidence from which
25 a jury may properly find a defendant guilty of a

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crime. One is direct evidence such as testimony of an eyewitness. The other is circumstantial evidence, which is proof of a chain of facts and circumstances surrounding the commission of the offense. As a general rule, the law makes no distinction between direct and circumstantial evidence. But simply requires that before convicting a defendant, the jury must be satisfied of the defendant's guilt. Beyond a reasonable doubt from all the evidence in the case.

Defendant is presumed innocent of the crime and thus the defendant although accused, begins the trial with a clean slate and with no evidence against him. And the law permits nothing but legal evidence to be presented before a jury to be considered in support of any charge against the accused. So that the presumption of innocence alone, is sufficient to acquit a defendant unless you, the jury, are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case. It is not required that the government prove ^{the defendant} guilty on all possible doubt. The test is one of reasonable doubt and reasonable doubt is doubt based upon reason and common sense. The

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1 kind of doubt that would make a reasonable person
2 hesitate to act.

3 Proof beyond a reasonable doubt must
4 therefore, be proof of such a convincing
5 character that you would be willing to rely and
6 act upon it unhesitatingly in the most important
7 of your own affairs. You the jury, will remember
8 that the defendant is never to be convicted on
9 mere suspicions or conjecture. The burden is
10 always on the prosecution to prove guilt beyond
11 a reasonable doubt. This burden never gets
12 to a defendant. The law never imposes upon a
13 defendant in a criminal case the burden or duty
14 of calling any witnesses or producing any evidence.
15 So if the jury views the evidence in the case as
16 reasonably permitting either of two conclusions;
17 one, of innocence and the other of guilt, you
18 the jury, should, of course, adopt the conclusion
19 of innocence.

20 I have said that the defendant may be proven
21 guilty either by direct or circumstantial evidence
22 and I have said direct evidence is the
23 testimony of one who asserts actual knowledge of
24 a fact such as an eyewitness. Also circumstantial
25 evidence is proof of a change of facts and

1 circumstances indicating the guilt or innocence
2 of a defendant. You the jury may make, such
3 inferences from proven facts. It is not necessary
4 that all inferences drawn from the facts and
5 evidence be consistent only with guilt and
6 inconsistent with every reasonable hypothesis
7 of innocence. The test is one of reasonable
8 doubt and should be based upon all the evidence.
9 The testimony of the witnesses, the documents
10 offered into evidence and reasonable inferences
11 which can be drawn from the proven facts.

12 An inference is a deduction or conclusion which
13 reason and common sense leads the jury to draw
14 the facts which have been proved. You are to
15 consider only the evidence in the case. But
16 in your consideration of the evidence, you are
17 not limited to the statements of the witnesses.
18 On the contrary, you are permitted to draw from
19 the facts which you find have been proved such
20 reasonable inferences as seem justified in the
21 light of your own experience.

22 A reasonable doubt may arise not only from
23 the evidence produced, but also from a lack of
24 evidence. Since the burden is on the prosecution
25 to prove the accused guilty, beyond a reasonable

1 doubt, a very essential element of the crime
2 charged, a defendant has the right to rely upon
3 failure of the prosecution to establish such
4 proof.

5 Credibility of witnesses; you as jurors
6 are the sole judges of the credibility of the
7 witnesses and the weight their testimony deserves.
8 And it goes without saying that you should
9 scrutinize all the testimony given. The
10 circumstances under which each witness testified
11 and every matter in evidence which tends to
12 show whether a witness is worthy of belief.
13 Consider each witness's intelligence, motive,
14 and state of mind. His demeanor, his or her
15 demeanor and manner while on the stand. Consider
16 the witness's ability to observe the manner as
17 to which he or she has testified and whether he
18 or she impresses you as having an accurate
19 recollection of these matters. Consider also
20 any relationship each witness may bear to either
21 side of the case. The manner in which each
22 witness might be affected by the verdict and the
23 extent to which, if at all each witness either
24 supports or is contradicted by the other evidence
25 in the case. Inconsistencies or discrepancies

1 in the testimony of the witnesses or between
2 the testimony of the different witnesses may
3 or may not cause the jury to discredit such
4 testimony. Two or more persons witnessing an
5 incident or transaction may see or hear it
6 differently. An innocent misrecollection like
7 failure of recollection is not an uncommon
8 experience.

9 In weighing the effect of a discrepancy
10 always consider whether it is of importance or
11 unimportant detail. And whether the discrepancy
12 results from innocent error or intentional
13 falsity. After making your own judgement, you
14 will give the testimony of each witness such
15 credibility if any, as you may think it deserves.
16 Another test that you can use in determining
17 the truthfulness or credibility of a witness,
18 is to use your own good common sense in addition
19 to these essentials that I have given to you.
20 You can use your good common experience as you
21 do in your everyday experience where you must
22 make important decisions based upon what others
23 tell you. When you decide to either accept or
24 ignore the statements of others, you use your
25 common sense. Your judgement will say to you

1 somehow or other that whatever they say is not,
2 does not appear to be truthful. That somehow
3 or other you just do not believe that they have
4 said. That is your ability to reason and your
5 ability to determine the truthfulness of the
6 person you are speaking with.

7 Likewise, your common experience should
8 be used to determine the weight to be given
9 the testimony of a witness. You take that
10 same common experience into the jury room. You
11 do not leave it outside. And in addition to what
12 I have said, use your common sense as a test in
13 exercising your good judgement and good determina-
14 tion whether or not this defendant is guilty
15 of the crime charged. It is for you to determine
16 whether the witnesses in this case have testified
17 truthfully and whether or not they have an
18 interest in the case. And what that interest may
19 be, how great it is, whether or not they have
20 told you falsehood. This is all for you to
21 determine. Every witness's testimony must be
22 weighed as to its truthfulness. If you find any
23 witness lie as to any material fact in the case,
24 then the law gives you certain privileges. One
25 of those privileges is that you have the right to

1 disregard the entire testimony of that witness.
2 If you find you can assist through that testimony
3 and determine which estimation is true and which
4 was false, then the law allows you to take the
5 portions which were true and weigh it. And
6 disregard those portions which were false.

7 That again, is within your prerogative.

8 The win of the evidence is not necessarily
9 determined by the number of witnesses, testifying
10 on either side. You should consider all the facts
11 and circumstances and evidence to determine which
12 of the witnesses are worthy of greater credence.
13 You may find that the testimony of a smaller
14 number of witnesses on one side is more credible
15 than the testimony of a greater number of
16 witnesses on the other side. You are not
17 obliged to accept the testimony if the testimony
18 is contradicted and the witness is not impeached.
19 You may decide because of the witness's bearing
20 and demeanor, because of the inherent probability
21 of his or her testimony or for other reasons,
22 sufficient to you that such testimony is not
23 worthy of belief. The government is not required
24 to prove the essential elements of the offense
25 as defined in these instructions by any particular

1 number of witnesses. The testimony of a single
2 witness may be sufficient to convince you beyond
3 a reasonable doubt of the existence of an
4 essential element of the offense charged. If
5 you believe beyond a reasonable doubt that the
6 witness is telling the truth.

7 The defendant takes the stand: when a
8 defendant in a case of this kind takes the
9 stand, which he has perfect right to do, he
10 is subjected to all the obligations of witnesses.
11 And his testimony is to be treated like the
12 testimony of any other witness; that is to say
13 it will be for you to say what the substance
14 of his testimony is and the manner in which he
15 gave it, his cross examination and everything
16 else in the case. Whether or not he told you
17 the truth. Then again, it is for you to remember
18 you have a perfect right to do so, the interest
19 of the defendant, the interest, the defendant
20 has in this case. As he placed himself as a
21 witness, he stands like any other witness.
22 Where a witness is a defendant on a trial in
23 a case, and by such statement or other conflict,
24 the defendant admits some facts against his
25 interest, then the statement or other conducts

1 if knowingly made or done, may be considered
2 as evidence of the truth of the fact so admitted
3 as well as for the purpose of judging the
4 credibility of the defendant as a witness.
5 An act or omission knowingly done if done
6 voluntarily, intentionally, not because of
7 mistake or act or other innocent reason, evidence
8 that at some other time a witness other than the
9 accused has said or done something or has failed
10 to do or say something which is inconsistent
11 with the witness's testimony, at the trial, it
12 may be considered by the jury for the sole purpose
13 of judging the credibility of the witness. But may
14 never be considered as evidence or truth or
15 proof of the truth of any such statement.
16 Judging the evidence, there is nothing peculiarly
17 different in the way the jury receives the evidence
18 in a criminal case from that which all reasonable
19 persons treat any questions depending upon the
20 evidence presented to them.

21 You are expected to use your good sense
22 and consider the evidence in the case which has
23 been admitted. Give it a reasonable and fair
24 construction in the light of your good common
25 sense as human beings. If an accused be prove

1 guilty beyond a reasonable doubt say so. If
2 not so prove guilty, say so. Keep constantly
3 in mind that it would be a violation of your
4 sworn duty to base a verdict of guilt upon any-
5 thing other than the evidence in the case. And
6 remember as well that the law never imposes
7 upon a defendant, in a criminal case, the burden
8 of or duty of calling any witnesses or producing
9 any evidence. The jury's recollection controls.
10 If any reference by the court or by counsel to
11 of evidence does not coincide with your
12 own recollection, it is your recollection that
13 which should control your deliberations. Punish-
14 ment on your oath as jurors, you cannot allow
15 consideration of the punishment which may be
16 inflicted upon the defendant if convicted.
17 To influence your verdict in any way, or any
18 sense enter into your deliberations, the duty of
19 imposing sentence rests exclusively upon the
20 court.

21 Your function is to weigh the evidence in
22 the case and to determine the guilt or innocence
23 of the defendant. Solely upon the basis of such
24 evidence and the law. You are to decide the case
25 upon the evidence and the evidence alone. And

1 you must not be influenced by any assumption,
2 or sympathy. Or any inference and
3 not warranted by the facts until proven to your
4 satisfaction.

5 Now in this type of case, there must be
6 a unanimous verdict which means that all twelve
7 of you must agree and it goes without saying
8 that it becomes incumbent upon you one another
9 to listen to each other's argument. Use your
10 good common sense. You have no right to stubbornly,
11 idly sit by and say, I am not talking to anyone.
12 Or to say, I am not going to discuss it. Because
13 people with common sense and the ability to
14 reason must communicate. They must communicate
15 their thoughts. So anything which appears in the
16 record about which one of you may not agree
17 talking out among yourselves and then, if you
18 can't agree as to what it is in the record, well,
19 you can ask the court to have that portion of the
20 testimony read back. You may do so, by giving
21 a note in writing to the clerk. Who will then
22 present it to the court and I will then bring
23 you into the courtroom. The foreman will preside
24 over your deliberations and will be your spokesman
25 here in court. He reporting your verdict to the

1 court, you will state the defendant is either
2 guilty or not guilty. Further, I may say to you
3 that in any deliberations there are certain
4 exhibits that are in evidence. You will take
5 those into the jury room with you and use those
6 exhibits during your deliberations.

7 Now having said that I think I shall excuse
8 the jurors number one and two. You are discharged
9 from this case with the thanks of the court.
10 The instructions are that you are to call the
11 jury clerk tomorrow afternoon on 596-3190.
12 The attorneys may come up to the side bar.

13 (A side bar discussion is held out of the
14 hearing of the jury.)

15 THE COURT: Any exceptions?

16 MS. SEYBERT: No, your Honor.

17 MS. SCHWARTZ: No, your Honor.

18 (The following takes place in the presence
19 of the jury.)

20 THE COURT: The clerk will swear in the
21 marshalls.

22 (The marshalls are sworn.)

CERTIFICATE OF SERVICE

Feb 13, 1976

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Jonathan J. Belberman